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U.S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 0 1 2010

EAC 05 080 51201

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner initially stated that she seeks employment as a special education teacher for District of Columbia Public Schools (DCPS). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner argues that the labor certification process would delay her work on online educational materials for developmentally disabled children.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on her own behalf on January 20, 2005. In a statement submitted with the initial filing, the petitioner explained why she believes she qualifies for the waiver:

> I am a **special education teacher for children with severe developmental disabilities** like autism, mental retardation and some learning disabilities. . . .

> [T]here is a **significant shortage of special education teachers** for students with severe and profound disabilities, mental retardation, mild to moderate disabilities, emotional disorders and learning disabilities. . . .
>
> In light of this national shortage, it is imminent [sic] that a highly qualified teacher like me with advanced degrees and published works in the field be given the opportunity to work permanently in the United States.

(Emphasis in original.) A shortage of qualified workers is an argument for obtaining, rather than waiving, a labor certification, because the labor certification process is intended to confirm that qualified United States workers are unavailable. *See Matter of New York State Dept. of Transportation* at 218. Therefore, the claimed shortage in the petitioner's profession is not a strong argument for granting the waiver. Eligibility must rest on the merits of the individual alien, rather than on the overall importance of the alien's occupation. Recognizing this, the petitioner discussed her specific merits:

> I am more than a certified, experienced teacher who is a Ph.D. Candidate in Special Education and M.A. in Communication. **What sets me apart** is my proven **innovation on in** [*sic*] **developing new ways to teach** children with developmental disabilities **using computer technology**. It is definitely rare for a special education teacher to be a published author and expert in computer technology. . . .
>
> Recently, the Best Buy **Te@ch** program awarded me $2,500 for my proposed *reality-Based Computer Program* that is designated to use simple web technology to teach children with autism and mental retardation how to label actual people, places and things. . . .
>
> Best Buy's Te@ch program just **confirmed my innovative teaching programs using technology** which began in the Philippines with the idea of using an online special school to help eradicate the shortage of special education teachers. This program was **published** in the *Philippine Special Education Journal* in July 2000. However, due to lack of personal funds, the growth of that online support school for the developmentally disabled is slow. Now that funds are beginning to be available, I now have the equipment and financial support to pursue it. I still own the domain http://www.special school.com/ and am developing it constantly to reach more students with disabilities. Through the Internet, I will have more impact in educating children with disabilities.
>
> . . . I plan to formally get academic standing as an educator who is an expert in applying technology in special education. I have been in communication with Columbia University's Teacher College in New York which offers an intensive summer course leading to [an] M.A. degree in Instructional Technology and Media. . . . And by the end of 2005, I will earn my PhD in Special Education and not just be a PhD candidate.

(Emphasis in original.) An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The petitioner's stated intention to pursue further degrees in her field cannot establish that she was already eligible for the waiver before she actually obtained those degrees. Furthermore, it is not readily apparent that the petitioner's possession of those additional credentials will automatically serve the national interest.

The petitioner also observes that she is the parent of an autistic teenager. This circumstance clearly gives her strong and sincere motivation to improve educational opportunities for children so afflicted, but we must judge the petition by impact and results, rather than by personal motivation.

The petitioner submitted copies of her monograph entitled "Understanding Persons of Philippine Origin: A Primer for Rehabilitation Service Providers" and her article entitled "Special School Online," published in the first issue of *The Philippine Special Education Journal*. The petitioner also submitted information about her Special School Online web site. These submissions established the existence of her publications, but not their impact.

The petitioner submitted nothing about the Best Buy te@ch award except for screen images from a web site. One fragmentary screen image listed five recipients:

Lucy Ellen Moten Elementary School	[redacted]	Washington DC
Lucy Ellen Moten Elementary School		Washington DC
Ludlow-Taylor Elementary	[the petitioner]	Washington DC
Luke Moore Academy Senior High School	[redacted]	Washington DC
McKinley Technology High School		Washington DC

Given that these five schools are all in the same city, and are very closely grouped in the alphabet, we can extrapolate a very high total number of te@ch award recipients. Another screen image states: "Thousands of schools from around the country applied for **te@ch** awards this year," and "49 DC public schools have received Best Buy **te@ch** awards." The total number of awards in Washington, DC alone is more than 49, because the record shows at least one instance of two awards going to the same school (Lucy Ellen Moten Elementary School).

On June 3, 2005, the director issued a request for evidence, stating that the petitioner had not shown that her "activities will be national in scope" or that her "work has resulted in findings of major significance to his/her field which have been widely implemented." In response, the petitioner claimed to have "**extraordinary ability in web content development and education**" and that her "**web-based school's impact will be national in scope**" (emphasis in original).

The petitioner established that she received an award from DCPS in June 2005, and was admitted to a graduate program at Columbia University in July 2005. Apart from the questionable national importance of these developments, these events took place well after the petition's January 2005 filing

date. We have already explained that events after the filing date cannot retroactively establish eligibility as of the filing date.

The petitioner submitted two witness letters. of the Information and Communications Technology Branch of the Philippine Overseas Employment Administration, stated:

> I have known [the petitioner] for more than 30 years and am familiar with her work as an educator who uses technology to teach children with disabilities. . . . She envisions a web site that will empower students with special needs and their respective families. . . . Her model was featured in the Philippine Special Education Journal in July 2000. I believe she will be able to fully develop her online school in the near future.

[redacted] of De La Salle University, Dasmarinas, Philippines, stated:

> I am glad to endorse the [petitioner's] published work . . . entitled "Understanding Persons of Philippine Origin: A Primer for Rehabilitation Service Providers." As a medical doctor and former dean of the De La Salle University-Health Sciences Campus College of Physical Therapy, I am aware of its impact to medical and health professionals in the United States who cater to patients from different cultures, including Filipinos.
>
> [The petitioner] did an excellent job in helping American rehabilitation workers be more sensitive to the needs of Philippine-born people. . . .
>
> [The petitioner] is primarily an educator of children with special needs. I personally know her and her family and I am aware of her passion to help and rehabilitate the disabled.

While these letters are highly complimentary to the petitioner, they are not objective evidence that her work has had significant impact beyond those who already knew her personally. We note that, while [redacted] stated that the petitioner "is primarily an educator of children with special needs," she did not discuss the petitioner's work in that area in any detail. [redacted] mentioned the petitioner's web site, but described it as a work in progress that was not yet "fully develop[ed]."

The director denied the petition on January 30, 2006, stating that a shortage in the petitioner's field does not justify a blanket waiver in that field, and that the petitioner submitted "no evidence that [she] has developed new methodologies or techniques that have been accepted and implemented by other professionals in her field or that she has otherwise had an impact on the field that has or will be national in scope."

On appeal, the petitioner stated that she "is developing an online school for children with special needs which can be accessed by anyone with Internet connection. Internet access is high in the United States so the proposed benefit is national in scope."

The petitioner is correct that, given the nature of the World Wide Web, nearly any web site could be said to have national scope because virtually anyone connected to the web could have access to the site. This does not mean, however, that every web site actually has national scope in practice. To find that web presence equals national scope is to dilute the latter term until it is practically meaningless. A more realistic test, therefore, is not whether people across the country *can* use the petitioner's web site, but whether they actually *do* use it. Evidence of such use could take many forms, such as, for instance, national media coverage of the site or widespread use of materials that originate from the site. (A comment board allowing anonymous or pseudonymous user feedback of unverifiable origin cannot suffice in this regard.) We will not attempt, here, an exhaustive list of ways to document use of a web site. The key point is that, to establish national use of a web site, the petitioner must do more than simply document the mere existence of the site. Furthermore, this national use should be fairly consistent; infrequent spikes of interest do not reliably establish ongoing activity at a national level.

In this particular instance, the petitioner has not even shown that her web site is fully operational, let alone that it is in use at a national level. The petitioner's unrealized future intentions and ambitions cannot establish national scope.

The petitioner also states:

> National Interest of the United States will be adversely affected if labor certification is required because the beneficiary is from the Philippines. Employment-Based Third Preference (EB-3) immigrant visas for Filipinos retrogressed and might take 10 years or more. Meanwhile, the beneficiary will be limited to [working in] the District of Columbia and will not be able to fully develop the Internet-based special school which will greatly help in solving the shortage of special education teachers.

The petitioner implicitly argues that, if DCPS were to file a petition (with a labor certification) on her behalf, then such a petition would be for a member of the professions under section 203(b)(3) of the Act, rather than a member of the professions holding an advanced degree under section 203(b)(2) of the Act, because her intended position with DCPS does not require an advanced degree. By granting the petitioner the national interest waiver, the beneficiary could claim the higher-priority classification and, thereby, more quickly become a permanent resident of the United States. The petitioner has submitted no evidence that Congress intended the national interest waiver to be a way for aliens from oversubscribed countries to shorten their wait for permanent resident status by claiming a higher priority immigrant classification. Furthermore, this argument presupposes that her work will serve the national interest, a conclusion that is the very point in dispute in this proceeding.

We note that, on the Form I-140 petition, the petitioner stated that she sought employment as a special education teacher "in the District of Col[u]mbia Public Schools." On appeal, the petitioner protests that the labor certification process will "limit her service [to the] DC area." The petitioner has essentially admitted that her employment with DCPS is simply an expedient pretext for admission into the United

States, and that once she attains permanent resident status, she intends to leave DCPS (its asserted teacher shortage notwithstanding) and devote her time to her web site.

We cannot find that the petitioner warrants the special benefit of the national interest waiver on the basis of her unfinished and unproven web site. She effectively concedes that she intends to work for DCPS only until she becomes a permanent resident. The petitioner has offered no other coherent basis for the waiver request.

We note that, several months after the filing of the appeal in this proceeding, DCPS filed an immigrant petition, with receipt number SRC 07 042 52918, seeking to classify the alien as a professional or skilled worker under section 203(b)(3) of the Act. USCIS approved that petition, which included an approved labor certification, on July 16, 2007. The priority date of the approved petition is October 27, 2006. The dismissal of the present appeal is without prejudice to any further proceedings arising from that approved petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.